



August 17, 2017

**VIA ELECTRONIC MAIL**

Regional Freedom of Information Officer  
U.S. EPA, Region 6  
1445 Ross Avenue (6MD-OE)  
Dallas, TX 75202-2733

**RE: Freedom of Information Act Request Regarding Communications Regarding U.S. Environmental Protection Agency's Proposed Promulgation of Air Quality Implementation Plans; State of Texas; Regional Haze and Interstate Visibility, 82 Fed. Reg. 912 (Jan. 4, 2017); or Final Promulgation of Air Quality Implementation Plans; State of Texas; Regional Haze and Interstate Visibility, 82 Fed. Reg. 48,324 (Oct. 17, 2017), EPA Docket No. EPA-R06-OAR-2016-0611; FRL-9969-07-Region 6.**

Dear Regional FOIA Officer:

This is a **supplemental** request<sup>1</sup> for information on behalf of Sierra Club pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the Environmental Protection Agency's ("EPA") FOIA regulations, 40 C.F.R. § 2.107.

Sierra Club also requests a fee waiver for this request under 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107.

**I. Records Requested**

Sierra Club requests the following records created, stored, or received between **October 19, 2017** and the date of your search, concerning:

- EPA's Proposed Promulgation of Air Quality Implementation Plans; State of Texas; Regional Haze and Interstate Visibility, which was published at 82 Fed. Reg. 912

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<sup>1</sup> See EPA Tracking No. EPA-HQ-2017-005878, EPA-HQ-2017-010174, and EPA-HQ-2017-000803.

(Jan. 4, 2017), or any plan for addressing the Regional Haze Rule's "Best Available Retrofit Technology" requirement for Texas; or

- EPA's **Final Promulgation of Air Quality Implementation Plans; State of Texas; Regional Haze and Interstate Visibility, 82 Fed. Reg. 48,324 (Oct. 17, 2017), EPA Docket No. EPA-R06-OAR-2016-0611; FRL-9969-07-Region 6.**

Specifically, we request:

- (1) All records reflecting communications concerning EPA's plans or any options for issuing a federal implementation plan or approving any state implementation plan addressing Texas's regional haze obligations, between EPA (including any communications that include EPA employees as recipients) and any of the following entities:
  - State of Texas;
  - Texas Commission on Environmental Quality;
  - Office of the Attorney General of Texas;
  - Luminant Generation Company LLC (also known as Vistra Energy), Big Brown Power Company LLC, Luminant Mining Company LLC, Big Brown Lignite Company LLC, or Luminant Big Brown Mining Company LLC;
  - Utility Air Regulatory Group;
  - American Electric Power (or Southwestern Electric Power Company);
  - Xcel Energy Services, Inc. (or Southwestern Public Service Company);
  - Coletto Creek Power;
  - NRG Texas Power LLC;
  - Lower Colorado River Authority ("LCRA");
  - El Paso Electric;
  - CPS Energy;
  - Utility Air Regulatory Group;
  - Balch & Bingham LLP;
  - Gibson Dunn;
  - Baker Botts LLP;
  - Hunton & Williams LLP;
  - and/or any other entity or individual representing an electric generating utility or the utility industry;
- (2) All records created, stored, or received by the EPA Administrator, or by other staff in the Office of the Administrator or Region 6, concerning EPA's plan for either of the above-captioned rulemakings.

For purposes of this request, the term "records" means information of any kind, including, but not limited to, documents (handwritten, typed, electronic or otherwise produced, reproduced, or stored), letters, e-mails, facsimiles, memoranda, correspondence, notes, databases, drawings, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained. As used herein, "and" and "or" shall be construed either conjunctively or disjunctively as required by the

context to bring within the scope of these requests any information which might be deemed outside their scope by any other construction.

Further, for purposes of this request, the term “records” includes any personal email messages, telephone voice mails or text messages, and internet “chat” or social media messages, to the full extent that any such messages fall within the definition of “agency records” subject to FOIA, 5 U.S.C. § 552.

We remind you that FOIA requires that you respond within 20 working days of your receipt of this request, *see* 5 U.S.C. § 552(a)(6)(A)(i), and that that response must “at least indicate within the relevant time period the scope of the documents [you] will produce and the exemptions[, if any, you] will claim with respect to any withheld documents.” *Citizens for Responsibility and Ethics in Washington v. F.E.C.*, 711 F.3d 180, 182-83 (D.C. Cir. 2013).

We ask that you disclose this information as it becomes available to you without waiting until all of the communications and records have been assembled for the time period requested. Sierra Club requests electronic copies of the records whenever possible.

## **II. Claims of Exemption from Disclosure**

If EPA regards any documents as exempt from required disclosure under the Freedom of Information Act, we request that you identify each allegedly exempt record in writing, provide a brief description of that record, and explain the agency’s justification for withholding it. We request that this explanation take the form of a *Vaughn* index, as described in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), and other related cases. If a document contains both exempt and non-exempt information, please provide those portions of the document that are not exempted from disclosure. Finally, if a document does not exist, please indicate that in your written response.

## **III. Fee Waiver**

Pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107, I respectfully request that EPA waive all fees associated with responding to this request because Sierra Club seeks this information in the public interest and will not benefit commercially from this request.

FOIA provides that fees shall be reduced “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”<sup>2</sup> EPA’s FOIA regulations contain an identical requirement.<sup>3</sup> The U.S. Department of Justice (DOJ) has identified six factors to assess whether a requester is entitled to a waiver of fees under

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<sup>2</sup> 5 U.S.C. § 552(a)(4)(A)(iii).

<sup>3</sup> 40 C.F.R. § 2.107.

FOIA, and the D.C. Circuit and other Courts of Appeals reference and apply these factors.<sup>4</sup> These factors are:

- A. Disclosure of the Information ‘is in the Public Interest Because it is Likely to Contribute Significantly to Public Understanding of the Operations or Activities of the Government.’
  - (1) **The subject of the request:** Whether the subject of the requested records concerns ‘the operations or activities of the government’;
  - (2) **The informative value of the information to be disclosed:** Whether the disclosure is ‘likely to contribute’ to an understanding of government operations or activities;
  - (3) **The contribution to an understanding of the subject by the general public likely to result from disclosure:** Whether disclosure of the requested information will contribute to ‘public understanding’; and
  - (4) **The significance of the contribution to public understanding:** Whether the disclosure is likely to contribute ‘significantly’ to public understanding of government operations or activities.
- B. Disclosure of the Information ‘is Not Primarily in the Commercial Interest of the Requester.’
  - (1) **The existence and magnitude of a commercial interest:** Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so
  - (2) **The primary interest in disclosure:** Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is ‘primarily in the commercial interest of the requester.’<sup>5</sup>

Sierra Club’s request complies with each of the factors agencies weigh in a fee waiver determination, as demonstrated below. If this information is not sufficient to justify a fee waiver, please contact us for further documentation before deciding upon the waiver request.

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<sup>4</sup> See, e.g., Stephen J. Markman, U.S. Dep’t of Justice, FOIA Update, Vol. VIII, No. 1, New Fee Waiver Policy Guidance at 3-10 (1987), *available at* [http://www.justice.gov/oip/foia\\_updates/Vol\\_VIII\\_1/viii1page2.htm](http://www.justice.gov/oip/foia_updates/Vol_VIII_1/viii1page2.htm); *Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 365 F.3d 1108, 1126 (D.C. Cir. 2004) (stating that “for a request to be in the ‘public interest,’ four criteria must be satisfied,” and citing agency’s multi-factor fee waiver regulation).

<sup>5</sup> Markman, *supra* note 4.

**A. Public Interest Factor**

The disclosure of this information is in the “public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.”<sup>6</sup> Sierra Club’s request complies with each of the criteria DOJ has identified for the public interest factor.

**i. The request concerns the operations or activities of the government.**

Sierra Club seeks information related to EPA’s communications and other records concerning the EPA’s plan for responding to the remand of the Cross-State Air Pollution Rule for Texas or either of the above-captioned rulemakings since the November 2016 presidential election.<sup>7</sup> Since EPA is an arm of the federal government, such EPA records plainly concern “operations or activities of the government.”<sup>8</sup>

**ii. The disclosure is “likely to contribute” to an understanding of government operations and activities.**

The records Sierra Club has requested bear upon EPA’s plan for responding to the remand of the Cross-State Air Pollution Rule for Texas or either of the above-captioned rulemakings that EPA has undertaken since the November 2016 presidential election, as well as any communications that EPA has received concerning the rule from outside entities. It is not currently public knowledge whether EPA has, since the November 2016 presidential election, received any communication from outside entities, such as industry groups or the White House, concerning EPA’s plan for responding to the remand of the Cross-State Air Pollution Rule for Texas or either of the above-captioned rulemakings. Thus, disclosure is “likely to contribute” to public understanding of government operations and activities.<sup>9</sup>

**iii. The information will contribute to the understanding of a reasonably broad audience of persons interested in the subject.**

This information will contribute to the understanding of a reasonably broad audience of persons interested in the subject.<sup>10</sup> The general public is already following issues related to air pollution from coal- and gas-fired power plants, which has frequently been the focus of investigative

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<sup>6</sup> See 40 C.F.R. § 2.107(l)(1).

<sup>7</sup> See June 27, 2016 Memorandum from Janet G. McCabe, Acting Assistant Administrator to Air Division Directors, Regions 1-10 Re: U.S. Environmental Protection Agency’s Plan for Responding to Remand of the Cross-State Air Pollution Rule Phase 2 SO<sub>2</sub> Budgets for Alabama, Georgia, South Carolina, and Texas; *see also EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118, 138 (D.C. Cir. 2015) (remanding for reconsideration the Phase 2 CSAPR sulfur dioxide and nitrogen oxide budgets for eleven states, including Texas).

<sup>8</sup> See 40 C.F.R. § 2.107(l)(2)(i).

<sup>9</sup> See 40 C.F.R. § 2.107(l)(2)(ii).

<sup>10</sup> See 40 C.F.R. § 2.107(l)(2)(iii).

reports by members of the media.<sup>11</sup> Thus, any EPA communications between the State of Texas, the Texas Commission on Environmental Quality, Luminant Generation Company LLC, Big Brown Power Company LLC, Utility Air Regulatory Group, Southwestern Public Service Company, Coletto Creek Power, NRG Texas Power LLC, and/or any other entity or individual representing an electric generating utility or the utility industry, concerning EPA's plan for responding to the remand of the Cross-State Air Pollution Rule for Texas or either of the above-captioned rulemakings will receive close and critical scrutiny from members of the public and the news media.

Sierra Club is particularly able to ensure that the information requested will be disseminated to the general public, and plan to do so.

The Sierra Club is the nation's oldest and largest grassroots environmental organization, with more than 3.5 million members and supporters, including online activists and newsletter subscribers. Its website is highly trafficked and Sierra Club media and communications reach hundreds of thousands of people through an extensive digital communications network and online information system, print magazine, radio show, web videos, and news reports.

Additionally, the Sierra Club has thousands of members and supporters and local chapters in Texas and throughout the nation dedicated to protecting and enhancing air quality across the nation—especially in the national parks and wilderness areas. The Sierra Club and its members have particular interests in protecting the National Parks, Wilderness Areas, and the people who explore and enjoy those areas from the significant environmental and public health impacts of large sources of air pollution.

To further those interests, the Sierra Club has played significant roles in numerous administrative and judicial proceedings that directly relate to the enforcement and implementation of the Clean Air Act in Texas. In recent years, the Sierra Club has participated in several rulemakings and judicial proceedings related to visibility protection provisions and its so-called “good neighbor” requirements in Texas. In fact, the Sierra Club has submitted extensive expert analysis and legal comments relating to the above-captioned rulemakings, urging EPA to strengthen Clean Air Act rules designed to protect air quality in the national parks and beyond from pollution emitted from coal-fired power plants in Texas. Sierra Club has engaged in similar administrative and judicial proceedings across the country to fulfill their missions to protect and enhance the national parks, wilderness areas, and to protect their members—and the general public—who recreate in those areas or who are otherwise exposed to the air pollution emitted by these facilities, and who are concerned about resulting health and environmental effects.

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<sup>11</sup> See, e.g., Heather Rogers, ProPublica, *Lobbyists Bidding to Block Government Regs Set Sights on Secretive White House Office*, July 31, 2014, available at <http://www.propublica.org/article/lobbyists-bidding-block-government-regs-sights-set-secretive-white-house>; Eric Lipton and Coral Davenport, New York Times, *Scott Pruitt, Trump's E.P.A. Pick, Backed Industry Donors Over Regulators*, Jan. 14, 2017, [https://www.nytimes.com/2017/01/14/us/scott-pruitt-trump-epa-pick.html?\\_r=0](https://www.nytimes.com/2017/01/14/us/scott-pruitt-trump-epa-pick.html?_r=0).

In addition, Sierra Club has the “ability and intention” to convey the information sought by the FOIA request to the public.<sup>12</sup> The Sierra Club can publicize information received from this request in monthly electronic newsletters, through social media, and email action alerts, which together reach hundreds of thousands of members, supporters, and subscribers. Sierra Club’s communications staff can also disseminate newsworthy information obtained from this request to the media.

In sum, Sierra Club has the ability to digest and quickly disseminate information gleaned from FOIA requests to the general public, and will make any newsworthy information or documents received in response to this request publicly available and will use them as the bases for public comments and further action regarding EPA’s plan for responding to the remand of the Cross-State Air Pollution Rule for Texas or either of the above-captioned rulemakings. Indeed, the material responsive to this FOIA request will be disseminated to inform and urge the public to participate in the rulemaking. Thus, Sierra Club is uniquely well positioned to analyze and publicize the requested information.

**iv. The information will contribute “significantly” to public understanding of government operations or activities.**

The information sought will contribute “significantly” to the ongoing public conversation about pollution from coal- and gas-fired power plants.<sup>13</sup> None of the materials requested are now widely known (if they have been made public at all), yet they are essential to the public’s understanding of EPA’s plan for responding to the remand of the Cross-State Air Pollution Rule for Texas or either of the above-captioned rulemakings, or any communications with outside entities concerning those rules. On June 27, 2016, EPA issued a memorandum informing the State of Texas of the Agency’s plan for responding to the D.C. Circuit Court of Appeals’ remand of the Cross-State Air Pollution Rule (“CSAPR”) for Texas. In that memorandum, EPA invited Texas to voluntarily participate in the Cross-State Air Pollution Rule through the submittal of a SIP revision showing that its affected sources are required to participate in CSAPR with annual emission budgets for sulfur dioxide and nitrogen oxides no less stringent than the budgets EPA codified at 40 C.F.R. §§ 97.710(a) and 97.410(a). Alternatively, EPA indicated that it would withdraw the federal Clean Air Act implementation plan requiring Texas sources to participate in CSAPR, and would address any remaining Clean Air Act obligations for the state in a subsequent federal implementation plan.

EPA subsequently proposed federal plans to address Texas’s Clean Air Act obligations left unfulfilled by the withdrawal of CSAPR—namely, the state’s obligations under the visibility and so-called good-neighbor provisions of the Act, 42 U.S.C. §§ 7410(a)(1)(D), 7491. 81 Fed. Reg. 78954 (Nov. 10, 2016); 82 Fed. Reg. 912 (Jan. 4, 2017). However, the extent to which EPA has engaged in communications with outside entities with respect to either of those rulemakings is not currently public information. As discussed above, Sierra Club will make any newsworthy information or documents received in response to this request publicly available and will use them as the bases for public advocacy, including in any future public proceedings concerning

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<sup>12</sup> See, e.g., Markman, *supra* note 4.

<sup>13</sup> See 40 C.F.R. § 2.107(l)(2)(iv).

these rules. Releasing this information will, thus, significantly enhance public understanding of any EPA activities since October 19, 2017 concerning EPA's plan for responding to the remand of the Cross-State Air Pollution Rule for Texas or either of the above-captioned rulemakings.

**B. Commercial Interest Factor**

The Sierra Club is a non-profit organization with no commercial, trade, or profit interests in the requested information. It seeks to use this information solely to inform the public and to support advocacy efforts around protecting human health and the environment through effective implementation of the Clean Air Act. Thus, there is no relevant commercial interest here, and the request is entirely in the public interest.

For all of the foregoing reasons, a fee waiver is warranted here under 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107. If EPA does not believe that the above information is sufficient to justify a fee waiver, please contact us for further documentation before deciding upon the waiver request.

Thank you for your assistance processing this request. Please contact me at the email or telephone number below if you have any questions or concerns about this request for information.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Joshua Smith', with a long horizontal stroke extending to the right.

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